APPEAL NO. 040248
FILED MARCH 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 19, 2003. In that case the hearing officer determined that the respondent's (claimant) impairment rating (IR) was 12% as assessed by the designated doctor. In Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, the Appeals Panel remanded the case for the designated doctor to consider and apply Texas Workers' Compensation Commission (Commission) Advisory 2003-10 (signed July 22, 2003), also noting that we find no authority to add 1% impairments for additional levels at L5-S1 and L3-4 to Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy, of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000).

The hearing officer, in the present case, recited in her Statement of the Evidence that she wrote the designated doctor on December 1, 2003, requesting clarification. A copy of that letter is in the file. The enclosure to that letter would indicate that a copy of that letter was sent to the appellant (carrier), to the claimant, to the carrier's registered Austin agent (although not to the carrier's attorney of record), and to the ombudsman. Also in the file is page 1 of Advisory 2003-10. The designated doctor's response, dated December 23, 2003, indicates that it was only sent to the hearing officer. The hearing officer did not hold a hearing on remand, or for that matter apparently even send a copy of the designated doctor's response letter to the parties, and issued a new decision which mirrored her original decision except noting the correspondence to and from the designated doctor. The hearing officer in the Statement of the Case recited that the Commission received the designated doctor's response on January 5, 2004, and "[t]he matter was held open for the designated doctor's response and the record was closed on January 8, 2004." The hearing officer in a decision dated January 8, 2004, found that the claimant's IR was 20% as certified by the designated doctor.

The carrier, in a letter dated January 27, 2004, to the hearing officer, asserted that a copy of the letter of clarification and the designated doctor's response was never sent to the carrier's attorney of record, that the carrier has not had an opportunity to respond to (or comment on) the designated doctor's clarification prior to the issuance of the CCH decision and order (on remand), and that it "has been deprived of its constitutional and statutory right to due process of law in this [IR] dispute." The carrier requested that the hearing officer "withdraw the CCH decision and order dated January 13, 2004." We note that there is no authority for the hearing officer to take such action.

Subsequently, the carrier timely appealed the hearing officer's decision on much the same grounds as set forth in its January 27, 2004, letter to the hearing officer and contended that the designated doctor had misapplied Advisory 2003-10. The carrier

further contended that it had been improperly precluded from reviewing the designated doctor's new/amended IR. The file does not contain a response from the claimant.

DECISION

Affirmed.

First, we categorically state that our affirmance of the hearing officer's decision in no way indicates approval of the procedures employed on remand. The hearing officer erred in failing to send a copy of the clarification letter to the carrier's attorney of record and failing to provide the parties the designated doctor's response and an opportunity to respond. Nonetheless, despite our disapproval of the hearing officer's failure to allow the parties to comment on the designated doctor's clarification we are without power or authority to provide a remedy on appeal. Section 410.203(c) states that "[a]n appeals panel may not remand a case under Subsection (b)(3) more than once." Following our remand for the designated doctor to consider and apply Advisory 2003-10, our only authority now is to either affirm the hearing officer's decision and order or reverse the decision and render a new decision pursuant to Section 410.203(b)(1) and (2).

On the merits we would note that the carrier asks that we remand this matter. As explained we are without authority to order a second remand. Regarding the complaint that the designated doctor "disregarded" the preoperative x-ray tests for "motion segment integrity" we are unable to tell if those tests existed and if or how the designated doctor considered them. In any event that would be insufficient to reverse and render a new decision reinstating the 12% IR. We disagree with the carrier's argument that it has the right to have the claimant examined by a required medical examination doctor after the designated doctor's assessment (considering Advisory 2003-10). Likewise the carrier (or the parties for that matter) do not have a right to forward letters of clarification to the designated doctor. Ideally the party requests a letter of clarification and the Commission, at its discretion, phrases the question in a neutral manner to the designated doctor. It is the Commission that seeks clarification from the designated doctor, not the parties.

For the reasons stated the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **FIDELITY & GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Margaret L. Turner
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The right to examine and rebut evidence is not confined to court trials but applies also to administrative hearings. Richardson v. Pasadena, 513 S.W.2d 1 (Tex. 1974). Courts also have articulated the requirement that a "full and fair hearing on all disputed fact issues" be accorded administrative litigants, Texas Employment Commission v. Johnnie Dodd, 551 S.W.2d 171 (Civ. App.-Waco 1977, writ ref'd n.r.e.), and have held that the basic notion of a fair hearing requires that a party "be apprised of the evidence contrary to his position so that he may refute, test, and explain that evidence," Railroad Commission v. Lone Star Gas, 611 S.W.2d 911 (Civ. App.-Austin 1981, writ ref'd n.r.e.). The Appeals Panel has previously addressed the same factual situation as the one presented in the instant case and held that it was reversible error to solicit a response from a designated doctor and write an opinion based thereon without having afforded the parties the opportunity to comment on the additional evidence. Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993. In Appeal No. 93323, *supra*, which also was a Decision on Remand, the Appeals Panel rendered a decision that a determination on maximum medical improvement and IR could not be made. With no further remands authorized in the present case, in my opinion, the proper remedy is to render a decision that the claimant's IR cannot be determined. Appeal No. 93323, *supra,* Texas Workers' Compensation Commission Appeal No. 93902, decided November 19, 1993; Texas Workers' Compensation Commission Appeal No. 93992, decided December 13, 1993;

Texas Workers' Compensation Commission Appeal No. 980502, decided April 15, 1998.

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Chris Cowan
Appeals Judge